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No. 96-355

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ARTHUR CALDERON, Warden,

Petitioner,

vs.

MICHAEL ANGELO MORALES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a state procedural default rule contains an exception for "good cause" or "sufficient reason," do the inherently uncertain contours of such a rule render it "inadequate" as an independent state ground of decision?

2. When a claim could be denied on either the merits or the procedural bar, does a state court's decision to deny on the merits constitute an inconsistent application of the bar, rendering the bar "inadequate" in cases where it is invoked?

3. Should the federal courts adopt such a restrictive view of the adequacy of state procedural bars that states are encouraged to adopt severe, rigid, exceptionless rules?

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition in this case. Counsel for petitioner has consented, but counsel for respondent has withheld consent.

In the accompanying brief, *amicus* argues that the division of opinion between the Ninth Circuit in this case and the Seventh Circuit in *Prihoda* v. *McCaughtry* makes this case appropriate for review on certiorari. In addition, further clarification by this Court is needed to resolve apparent conflicts in this Court's prior opinions.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the

accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The Ninth Circuit's refusal to respect California's procedural default rules in *Siripongs* v. *Calderon*, 35 F. 3d 1308 (1994) and the present case has needlessly delayed enforcement of the state's death penalty, reducing its deterrent effect. Those delays are contrary to the rights of victims and society which CJLF was formed to advance.

For the foregoing reasons, *amicus* requests leave to file its brief.

October, 1996

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

SUMMARY OF FACTS AND CASE

Fifteen years ago, Michael Morales raped, tortured, and murdered Terri Winchell. He was convicted of these crimes and sentenced to death in 1983. *People* v. *Morales*, 48 Cal. 3d 527, 539-541, 770 P. 2d 244, 248-249 (1989). The conviction and sentence were affirmed seven years ago. *Id.*, at 573, 770 P. 2d, at 271. At about the same time, the California Supreme Court adopted standards requiring habeas petitions in capital cases to be filed in a timely manner. See *Morales* v. *Calderon*, 85 F. 3d 1387, 1388 (CA9 1996).

Even though California provides state habeas counsel in capital cases, Morales filed his first habeas petition in federal court, including 32 claims never presented in state court. *Ibid.* The federal district judge dismissed these claims without prejudice to allow their exhaustion in state court. *Ibid.*

Morales then filed two habeas petitions in the California Supreme Court, three and one-half years after affirmance on

direct appeal and after adoption of the California standards. The state court denied these petitions both on the merits and as untimely. *Id.*, at 1389-1390.

The district court found that the denial was based on adequate and independent state grounds and that Morales had not met the requirements for exceptions to the procedural default rule. *Id.*, at 1389. Hence, it dismissed these claims. *Ibid.* The Court of Appeals reversed, finding that California's procedural default rule was not "clear, consistently applied, and well-established." *Id.*, at 1393.

SUMMARY OF ARGUMENT

The decision below conflicts with the decision of the Seventh Circuit in *Prihoda* v. *McCaughtry*. That case recognized the value of flexible rules of waiver of default in state habeas cases and refused to declare a state rule "inadequate" because of the existence of such waivers. The present opinion, in contrast, will not regard a state rule as "adequate" unless the federal court can decide for itself whether the state courts are applying their own law correctly.

Certiorari should also be granted to clear up contradictions in this Court's prior opinions. The cursory, footnote treatment of the issue in *Dugger* v. *Adams* and the apparent conflict between the result of that case and language in *Hathorn* v. *Lovorn* will only breed confusion in lower courts until this Court provides further explanation.

The approach of the Ninth Circuit in the present case provides California with a powerful incentive to adopt a rigid rule of default with no exceptions. This approach should be rejected so that the state can consider late petitions when justice requires without losing the benefits of its procedural default rules in the bulk of cases.

ARGUMENT

I. The decision of the Ninth Circuit in the present case directly conflicts with the position of the Seventh Circuit on an important question of federal law.

A case is appropriate for review on certiorari "[w]hen a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter . . . ." Supreme Court Rule 10.1. The present case is an exemplar of such a conflict.

Balancing the need for finality against the need to correct fundamental injustices, this Court has determined that a habeas petitioner seeking to raise a defaulted claim must show "cause" for the default. See *Francis* v. *Henderson*, 425 U. S. 536, 542 (1976). Not surprisingly, many state courts and legislatures have come to similar conclusions. Hence, California requires a showing of "good cause" for an untimely petition, see *Morales* v. *Calderon*, 85 F. 3d 1387, 1390 (CA9 1996) (quoting Supreme Court Policies Regarding Cases Arising from Judgments of Death, Standard 1-2 (1990)). Similarly Wisconsin requires "sufficient reason" for a successive collateral attack. *Prihoda* v. *McCaughtry*, 910 F. 2d 1379, 1381 (CA7 1990) (quoting Wis. Stat. § 976.06(4)). These two very similar rules suffered very different fates at the hands of two different circuits.

The nub of the dispute is the requirement that the state rule be "strictly or regularly followed." *Barr* v. *Columbia*, 378 U. S. 146, 149 (1964).

> "A requirement of consistency poses special problems for forfeiture rules, because every state uses exceptions such as 'plain error' or 'sufficient reason' or even 'cause and prejudice' to deal with cases in which application of the ordinary rules would produce unacceptably harsh consequences." *Prihoda*, 910 F. 2d, at 1383.
>
> "Searching for 'regularity' in the state's employment of excuses and exceptions would embroil the federal court deeply in questions of state law and procedure. An alternative to the comprehensive survey of state cases every time a state invokes waiver is to recharacterize what it means for a state to apply its rule strictly. Both the Supreme Court and

> the inferior courts respect state procedural grounds unless they are regularly *dis*regarded (or seemingly have been manufactured for the occasion, as in *Johnson*). A state ground that is solidly established will be respected even though not 'strictly' followed. Any other approach would discourage state courts from applying plain error doctrines, lest giving one prisoner a break disable the state from enforcing its procedural rules with respect to many others. Neither prisoners' interests nor the interest of federalism would be served by such a development." *Id.*, at 1384 (emphasis in original).

Prihoda claimed that the fact he was unrepresented in his first collateral attack was "sufficient reason" to consider a second, *id.*, at 1381, and claimed inconsistency in the Wisconsin courts' acceptance of that reason in some cases and rejection of it in others. *Id.*, at 1384. The Seventh Circuit rejected that argument, noting that other factors, such as the importance of the issue, were also involved. *Ibid.* Case-by-case judgment is required to implement such a rule.

> "The difficulty of drawing lines, especially under standards such as 'sufficient reason,' makes uncertain application inevitable. Uncertainty is not enough to disqualify a state's procedural ground as one 'adequate' under federal law. *If it were, states would be induced to make their rules draconian rather than to allow prisoners the latitude now available.*" *Id.*, at 1385 (emphasis added).

The opinion of the Ninth Circuit in the present case stands in stark contrast to the wisdom of *Prihoda*. Instead of recognizing the need for standards such as "good cause" and the benefits to prisoners of having them, the opinion begins by criticizing California's rule for not "set[ting] out criteria for determining 'good cause' to excuse such delay." *Morales*, 85 F. 3d, at 1391.

Then the opinion below makes this statement: "The vagueness of the Standards could have been *cured by narrowing judicial construction* in the years immediately following their issuance. We find no such cases, however." *Ibid.* (emphasis added). This concept is lifted straight from the cases on vagueness of statutes defining crimes or establishing eligibility for capital punishment. See, *e.g.*, *Richmond* v. *Lewis*, 506 U. S.

40, 47 (1992); *Kolender* v. *Lawson*, 461 U. S. 352, 355 (1983). The Ninth Circuit apparently believes that a rule granting *leniency* to a litigant who has defaulted his claim must be drawn with the same precision as a law which *sends* people to the gallows.

Later in the opinion, the Ninth Circuit acknowledges the value of discretionary rules, but then implies that only certain kinds of discretion will do. See *Morales*, 85 F. 3d, at 1392. Unless the state court establishes a body of case law laying out guidelines for the exercise of discretion, the Ninth Circuit will not find the requirement for an "adequate" state ground to have been met. *Ibid*. Because the California Supreme Court, like this Court, typically does not write opinions when it denies original habeas petitions, see *ibid*., that requirement is not going to be met.

In effect, the Ninth Circuit has created a presumption of irregularity, inverting the usual rule. Cf. *Parke* v. *Raley*, 506 U. S. 20, 29 (1992) ("presumption of regularity" "deeply rooted in our jurisprudence"). Not only must the procedural ground be stated in the individual case, as *Harris* v. *Reed*, 489 U. S. 255, 263 (1989) may require, but the California Supreme Court must now write opinions in *all* of its original habeas petitions so that the Ninth Circuit can "peer majestically over the [state] court's shoulder," *Lewis* v. *Jeffers*, 497 U. S. 764, 780 (1990) (quoting *Godfrey* v. *Georgia*, 446 U. S. 420, 450 (1980) (White, J., dissenting)), and supervise its application of *state* law.

The Seventh Circuit applies the opposite presumption. The general rule is that state procedural grounds will be respected. To breach this wall, the burden is on the habeas petitioner to show that the state rules "are regularly *dis*regarded (or seemingly have been manufactured for the occasion, as in *Johnson*)." *Prihoda*, 910 F. 2d, at 1384 (emphasis in original).

This issue has always been important. It is even more important now, after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, discussed in part III, *infra*. The conflict between *Prihoda* and the present case makes this an appropriate case for this Court's review.

II. Certiorari should be granted in this case to resolve contradictions in this Court's earlier opinions.

Hathorn v. *Lovorn*, 457 U. S. 255, 263 (1982) states that a procedural ground is adequate only if the state courts apply it evenhandedly "to all similar claims." Courts of appeals taking a restrictive view of the "adequacy" requirement have latched on to this phrase. See, *e.g.*, *Messer* v. *Roberts*, 74 F. 3d 1009, 1015 (CA10 1996).

Dugger v. *Adams*, 489 U. S. 401 (1989), however, appears to be inconsistent with the *Hathorn* rule, or at least with a strict interpretation of it. Adams claimed a violation of the rule of *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985), but he had not objected at trial, on appeal, or in his first round of state and federal collateral review. *Id.*, at 404-405. The state court held the claim was barred. *Id.*, at 405. The *Adams* dissent noted several cases in which similarly belated *Caldwell* claims had been considered and rejected on the merits, *id.*, at 416-420, and relied on the *Hathorn* rule. *Id.*, at 420.

The *Adams* majority only responded in a footnote. Even though *Hathorn* says "all," the *Adams* Court referred to "the vast majority of cases." *Id.*, at 411, n. 6. The majority says "the few cases that respondent [Adams] and the dissent cite do not convince us that the Florida Supreme Court fails to apply its procedural rule regularly and consistently." *Ibid.* Regrettably, the majority does not really say *why* they do not. As the dissent notes, the reasons the majority gives are not persuasive. *Id.*, at 418 (opinion of Blackmun, J.).

If *Adams* was correctly decided, as *amicus* CJLF firmly believes it was, further clarification of its rule is required. The apparent conflict between the statement in *Hathorn* and the result in *Adams* will only fester until it is resolved. No other court has the authority to overrule this Court's precedents, see *Hutto* v. *Davis*, 454 U. S. 370, 375 (1982) (*per curiam*), and so that resolution must be found here.

A clue to the resolution can be found at the end of *Adams*' discussion of the four Florida cases submitted as proof of inconsistent application.

> "Regardless of whether any of these cases might be subject to federal habeas review because of the lack of a plain statement that the decision was based on state law grounds, an issue we considered in *Harris* v. *Reed*, *ante*, at p. 255, we do not believe that they are sufficient to undercut the adequacy of the Florida procedural rule." *Adams*, 489 U. S., at 411-412, n. 6.

In other words, the effect on federal habeas of a state court's decision to rule on the merits and not on procedural grounds in the petitioner's *own* case is not the same as the effect of such a decision in *other* cases. These different facets of the procedural default doctrine must be examined in light of their different purposes.

When the state court's decision in the petitioner's own case is based on the merits and not on procedural default, then the state judgment does not, in fact, rest on state law. In such a case, the reason for the procedural default rule is simply absent, see *Harris* v. *Reed*, 489 U. S. 255, 262 (1989) (rule based on independent state ground doctrine), and the rule should not apply. For this purpose, it makes no difference whether the state court accepted or rejected the defendant's argument. The shield from federal review on certiorari or habeas is dropped either way. *Id.*, at 263 (habeas, claim rejected); *Michigan* v. *Long*, 463 U. S. 1032, 1044 (1983) (certiorari, claim accepted).

However, when the procedural ground was asserted in petitioner's case but not in others, the interests involved are different. There are two evils to be avoided here. One is a lack of fair notice. See *Wright* v. *Georgia*, 373 U. S. 284, 291 (1963) ("no prior Georgia case . . . gives notice of the existence of [the] requirement"). When a state court lays out a course as proper in one case and then declares it a default in another, the defendant has been unfairly denied his day in court. See, *e.g.*, *Johnson* v. *Mississippi*, 486 U. S. 578, 587-588 (1988). The second problem is discrimination. A state rule should not be manipulated to discriminate against certain classes of defendants or claims. For example, in *Williams* v. *Georgia*, 349 U. S. 375 (1955), the state court held a claim of racial discrimination in jury selection to be defaulted, but relief on similarly late claims of nonracial jury selection irregularities had been granted in numerous cases. *Id.*, at 384-387.

For this latter purpose, it matters a great deal whether the claims in the other cases were accepted or rejected. In *Adams*, *supra*, the case of *Combs* v. *State*, 525 So. 2d 853, 856 (1988) was asserted as an inconsistent application of the state rule, because the state court addressed and rejected Combs' defaulted *Caldwell* claim. But the state court was not doing Combs any favors by this ruling. By addressing and rejecting his claim, the Florida Supreme Court cleared the way for the same instruction to be used again on retrial.[1] The trial judge might otherwise have been inclined, though not required, to follow contrary Eleventh Circuit precedent. See *id.*, at 856-857 (discussing and rejecting Eleventh Circuit cases).[2]

Frequently in the law, the moving party must clear more than one hurdle in order to obtain the relief he seeks. The general rule in such cases is that the court need not evaluate the case in any particular order. If the claim fails to clear one hurdle it may be rejected, and closer, more difficult questions need not be addressed.

Strickland v. *Washington*, 466 U. S. 668 (1984) is a prime example of this principle. The petitioner must show both unprofessional deficiency in counsel's performance and resulting prejudice. *Id.*, at 687. If the second element is clearly absent, the first need not be addressed. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.*, at 697.[3]

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1. Combs' penalty phase had to be retried for other reasons. *Id.*, at 855.

2. On a related point, *Coleman* v. *Thompson*, 501 U. S. 722, 743 (1991) held that a state court decision rejecting a claim on the merits and declining to decide a procedural bar question did not impair the "independence" of the state rule.

3. *Teague* v. *Lane*, 489 U. S. 288 (1989) (plurality) is an exception. That case established a prescribed order of issues (retroactivity first, "merits" second) only because the plurality felt this order to be required by the constitutional imperative of avoiding advisory opinions. *Id.*, at 316. As *Strickland* demonstrates, that is not required for other rules.

A similar situation commonly arises in belated and successive collateral attacks. Effective lawyers winnow out the weak claims and concentrate on those with a substantial probability of success. *Smith* v. *Murray*, 477 U. S. 527, 536 (1986). Those left-out, weak claims then appear in the belated filings, both defaulted and meritless. Federal default law is sometimes a "morass," making rejection on the merits the simpler course, see *Grubbs* v. *Delo*, 948 F. 2d 1459, 1463, n. 3 (CA8 1991), and the same is true in some states. In a state with discretionary exceptions for defaulted claims, the merits will often be clearer than the procedural bar question.

For example, after this Court's remand order in *Bacigalupo* v. *California*, 506 U. S. 802 (1992), many death row inmates filed challenges to an aspect of California's death penalty law which had long been regarded as settled. Rejection of these belated claims on procedural grounds would require resolution of the knotty problems of when novelty of a claim is "cause," see *Engle* v. *Isaac*, 456 U. S. 107, 131 (1982); *Reed* v. *Ross*, 468 U. S. 1, 13 (1984), and when failure to make a claim on appeal is ineffective assistance. See *Smith*, 477 U. S., at 535. But after *Tuilaepa* v. *California*, 129 L. Ed. 2d 750, 114 S. Ct. 2630 (1994), the substantive question is once again settled. A court would not in any way denigrate its own procedural default law by deciding that a controlling precedent on the merits was a clearer and simpler way to resolve the case.

This Court took that route on one of the claims in *Gray* v. *Netherland*, 135 L. Ed. 2d 457, 116 S. Ct. 2074 (1996). Gray had two complaints about certain penalty phase evidence in his case: a "notice-of-evidence" claim, that he had not received adequate notice, and a "misrepresentation" claim, that the prosecution had affirmatively misled him about the evidence. *Id.*, at 470, 116 S. Ct., at 2081. The state asserted procedural default on both aspects. Brief for Respondent in No. 95-6510, p. 39; see also Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in No. 95-6510, pp. 11-16. The concurring judge in the Court of Appeals had found the claim procedurally defaulted. *Gray* v. *Thompson*, 58 F. 3d 59, 67-68 (CA4 1995) (opinion of Hall, J.).

This Court found the record on procedural default of the misrepresentation claim sufficiently muddled to require a

remand. 135 L. Ed. 2d, at 472-473, 116 S. Ct., at 2082-2083. However, on the notice-of-evidence claim, this Court, like the Court of Appeals majority, simply skipped the procedural default issue and decided the case on *Teague* grounds. *Id.*, at 473-475, 116 S. Ct., at 2083-2085; 58 F. 3d, at 64-66. The closest precedent was contrary to the petitioner's position, 135 L. Ed. 2d, at 474, 116 S. Ct., at 2084, and thus the *Teague* bar was clear.[4]

Is *Gray* evidence that this Court and the Fourth Circuit fail to regularly and consistently apply the procedural default rule? Of course not.

Procedural default is a barrier to a *grant* of relief on the merits. It is not necessarily a barrier to *denial* of relief on the merits.[5] A court's decision to deny relief on another ground and not reach the procedural default question is not a failure to consistently apply its procedural rule. Common sense and judicial economy require that the massive tidal wave of claims being filed by habeas petitioners be resolved in the most expeditious manner possible, consistent with due process. When the petitioner's inability to clear one hurdle is apparent, examining the others is a pointless exercise.

In short, a state court does not act in disregard of its own procedural default rule unless it reaches a result contrary to that rule. A writ of certiorari in the present case is necessary to clarify this important point.

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4. The dissent did not dispute that a claim based on short notice alone would be *Teague*-barred. See *id.*, at 483-484, 116 S. Ct., at 2091 (generally no right to notice of evidence, as opposed to issues, at all) (opinion of Ginsburg, J.). The dissent objected instead to the separation of the two aspects of the claim and would have based a contrary decision on the "misrepresentation" aspect. See *id.*, at 482, 116 S. Ct., at 2090.

5. For the exhaustion rule, this distinction is now in the statute. See 28 U. S. C. § 2254(b)(2), as amended Pub. L. 104-132, § 104, 110 Stat. 1214, 1218.

III. The approach of the Ninth Circuit establishes a perverse incentive for states to adopt draconian policies.

California is in its present predicament because of the relative generosity of its procedural default rule. The Ninth Circuit's decision in the present case furnishes a powerful incentive to scrap that rule and establish a severe, rigid, exceptionless cutoff. Such a development would not serve the interests of justice. *Prihoda* v. *McCaughtry*, 910 F. 2d 1379, 1385 (CA7 1990); cf. *Sandin* v. *Conner*, 132 L. Ed. 2d 418, 428-429, 115 S. Ct. 2293, 2299-2300 (1995) (states may be discouraged from adopting desirable rules if that adoption breeds federal litigation).

The California rule establishes a "safe harbor" for petitioners within which their petitions will be presumed timely, but it also allows a petitioner to show that a later petition was timely or that there was good cause for delay. See *Morales* v. *Calderon*, 85 F. 3d 1387, 1390 (CA9 1996). The decision below found this too vague. *Id.*, at 1391. An alternative which would surely pass muster on "vagueness" grounds would be a rule that *all* claims with *no* exceptions must be filed by a fixed date.

In a unitary system, such a severe curtailment of habeas corpus would not be one that *amicus* CJLF or other responsible anticrime groups would support. Such action may be necessary, however, to stop the delays and the drain of resources which will follow from this decision.

When a claim is filed in federal habeas, it must fit in one of three categories, based on its history in state court: resolved on the merits, unexhausted, or procedurally defaulted. Unexhausted claims must be dismissed or denied on the merits. 28 U. S. C. § 2254(b), as amended by Pub. L. 104-132, § 104, 110 Stat. 1214, 1218. Claims resolved on the merits will only be reviewed for reasonableness. *Id.*, subd. (d). Defaulted claims will be denied unless the "cause and prejudice" or "actual innocence" test is met. *Murray* v. *Carrier*, 477 U. S. 478, 495-496 (1986) (unchanged by the new legislation).

Under this system, federal habeas should be vastly less expensive and time-consuming than it has been to date. Full-scale federal review of a claim should be a relatively rare event. Determining that another court's decision falls inside the range

in which reasonable judges can differ is far simpler than deciding the underlying question *de novo*.

The benefits of this reform will not be realized, however, if the federal courts routinely review *de novo* every defaulted claim under the assertion that the state's default rule is inadequate. To avoid that disaster, the state will be forced to err on the side of severity.

Simple rules tend to be harsh rules; rules that take into account the myriad variations of real cases tend to be complex and uncertain. Compare *Coleman* v. *Thompson*, 501 U. S. 722, 740 (1991) (30-day deadline, unwaivable) with *In re Clark*, 5 Cal. 4th 750, 779-780, 855 P. 2d 729, 748 (1993) (ineffective assistance of habeas counsel will be considered, even though not constitutionally required). California can make its rules clear and simple if that is what the federal courts really require. The result, however, will definitely *not* be in the long-term best interests of habeas petitioners as a class.

CONCLUSION

The petition for writ of certiorari should be granted.

October, 1996

Respectfully submitted,

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